FILED
SEP 27 1951
CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

October Term, 1951

No. 356

JOHN JONES, an infant, by his Guardian *Ad Litem*, Joseph Jones; JOSEPH JONES and BEATRICE JONES, Father and Mother, Jointly; and JOSEPH JONES, individually,

Petitioners,

vs.

ST. MARY'S ROMAN CATHOLIC CHURCH, operating under the style and name of St. Mary's Roman Catholic School (Grammar),

Defendant-Respondent.

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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IN THE

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October Term, 1951

No.

JOHN JONES, An Infant, by his Guardian *Ad Litem*, Joseph Jones; JOSEPH JONES and BEATRICE JONES, father and mother, jointly; and JOSEPH JONES, individually,

Petitioners,

vs.

ST. MARY'S ROMAN CATHOLIC CHURCH, operating under the style and name of St. Mary's Roman Catholic School (Grammar),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Your Petitioners, above named, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of New Jersey entered in the above entitled cause on the 29th day of June, 1951.

Opinions Below

The opinion of the Supreme Court of New Jersey is reported in 7 N. J. 533 (1951).

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on the 29th day of June, 1951. The jurisdiction of this Court is invoked under Section 1257 of Title 28 of the

United States Code, reading to the extent relevant here, as follows:

> "Final judgments * * * rendered by the highest court of a state in which a decision would be had, may be reviewed by the Supreme Court, as follows:
>
> (1) * * *
>
> (2) * * *
>
> (3) By writ of certiorari where * * * any title, right, privilege, or immunity is specially set up or claimed under the Constitution * * * of * * * the United States."

The Federal questions involved were argued orally both in the trial court and were incorporated in the brief and oral argument presented to the Supreme Court of New Jersey. Both of said courts disregarded the argument so presented.

Questions Presented

1. Whether the Supreme Court of New Jersey, and its predecessors, denied Petitioners the benefit of the due process of law clause of the 14th amendment to the Constitution of the United States by depriving Petitioners of a common law remedy which was guaranteed by the Constitution of New Jersey, wherein charitable organizations were exempted from liability for their tortious acts which resulted in injury or harm to the recipients of their bounty.

2. Whether the Supreme Court of New Jersey, and its predecessors, denied to Petitioners the benefit of the equal protection of law clause of the 14th amendment to the Constitution of the United States by arbitrarily classifying for the purpose of exempting charitable organizations from tort liability to recipients of their bounty.

3. Whether the Supreme Court of New Jersey, and its predecessors, denied to Petitioners the benefit of the equal protection of law clause of the 14th amendment to the United States Constitution by depriving Petitioners of a common law remedy by exempting charitable organizations from liability for their tortious acts to the recipients of their bounty.

4. Whether the Supreme Court of New Jersey, and its predecessors, by adopting and applying the rule of immunity exempting charitable organizations from liability for their tortious acts to the recipients of their bounty, denied to Petitioners the benefit of the impairment of obligation of contract clause in Article I, Section 10, Paragraph 1, of the Constitution of the United States.

Although not argued before the Supreme Court of New Jersey nor set up in the brief, it is urged that the decision and judgment entered in this cause by the Supreme Court of New Jersey denies to Petitioners the benefit of the due process of law clause of the 14th amendment to the Constitution of the United States by depriving Petitioners of a trial by jury.

Statement of Facts

In this case, the infant Plaintiff, 12 years of age, was injured by a fellow pupil on the premises of the defendant while both were attending a parochial school conducted by the Defendant in the Borough of Rutherford, County of Bergen and State of New Jersey. As a result of said injury, the infant plaintiff permanently lost the sight of his right eye. It is charged that said injury was the proximate result of the negligence of the defendant. In the trial division of the Superior Court, the defendant moved, under the Court Rules, for a summary judgment in its behalf on the ground that it was exempt by judicial decision from

liability for its tortious acts since it was a charitable organization and the plaintiffs were recipients of its bounty. Upon this ground the trial court granted said motion for summary judgment. Thereupon plaintiffs appealed to the Appellate Division of the Superior Court, and while pending consideration there, said appeal was certified to the Supreme Court of New Jersey on the latter court's own motion. The Supreme Court, aforesaid, the highest court of the State of New Jersey in which a decision could be had, entered a final judgment of affirmance on the 29th day of June, 1951, in said cause, although the form of the judgment provided that it should issue ten days after said date, unless an application for a rehearing shall have been granted or is pending or unless otherwise ordered by said court. No application for rehearing was made and the court did not otherwise order. On the 12th day of September, 1951, Petitioners petitioned the Supreme Court of New Jersey for certification of federal questions. Said petition was denied by said Court on the 17th day of September, 1951.

Specification of Errors

The Supreme Court of New Jersey erred in the following respects:

1. The Supreme Court of New Jersey erred in holding and deciding that a charitable organization is exempt from liability for their tortious acts where the victim is a recipient of its bounty.

2. The Supreme Court of New Jersey by holding and deciding that such charitable organization is immune from liability for its tortious acts to recipients of its bounty deprived Petitioners of a common law cause of action and thereby deprived Petitioners of a property right contrary to the due process of law clause of the 14th amendment to the Constitution of the United States.

3. The Supreme Court of New Jersey by holding and deciding that such charitable organization is immune from liability for its tortious acts to the recipients of its bounty, while being liable to all other persons, usurped the power of the legislative department of government, thereby depriving Petitioners of the benefit of the due process of law clause of the 14th amendment to the Constitution of the United States.

4. The Supreme Court of New Jersey by holding and deciding that such charitable organization is immune from liability for its tortious acts to the recipients of its bounty, while being liable to all other persons, classified, contrary to the powers granted to such court, thereby violating the equal protection of law clause of the 14th amendment to the Constitution of the United States.

5. The Supreme Court of New Jersey by holding and deciding that such charitable organization is immune from liability for its tortious acts to the recipients of its bounty, while being liable to all other persons, failed to apply the common law of England as required by the Constitution of the State of New Jersey, thereby violating the due process of law clause of the Constitution of the United States.

6. The Supreme Court of New Jersey by holding and deciding that such charitable organization is immune from liability for its tortious acts to the recipients of its bounty, while being liable to all other persons, failed to apply the doctrine of *stare decisis* properly and thereby violated the due process of law clause of the 14th amendment to the United States Constitution.

7. The Supreme Court of New Jersey by holding and deciding that such charitable organization is immune from liability for its negligent performance of its contracts deprived Petitioners of the benefit of the provisions of

Article I, Section 10, Paragraph 1 of the Constitution of the United States, pertaining to the impairment of the obligation of contracts.

8. In this proceeding there is drawn in question the validity of the decisions and judgments in the cases of *D'Amato* v. *Orange Memorial Hospital,* 101 N. J. L. 61 (1925), and *Bianchi* v. *South Park Presbyterian Church,* 123 N. J. L. 325 (1939), on the ground that the immunities therein granted are repugnant to the due process of law clause and the equal protection of law clause of the 14th amendment to the Constitution of the United States for the reasons set forth in the foregoing assignment of errors.

9. Although not argued heretofore nor incorporated in the brief before the Supreme Court of New Jersey, it is now urged that the Supreme Court of New Jersey by adopting and applying the aforesaid rule of immunity as relating to charitable organizations deprived Petitioners of a trial by jury in violation of the due process clause of the 14th amendment to the Constitution of the United States and contrary to the provisions of Article I, Paragraph 7 of the New Jersey Constitution of 1947.

10. The Supreme Court of New Jersey by holding and deciding that no factual question as to the charitable character of the defendant existed denied to Petitioners a trial by jury contrary to the provisions of Article I, Paragraph 7, of the New Jersey Constitution of 1947 and the due process of law clause of the 14th amendment to the Constitution of the United States.

Reasons For Granting the Writ

1. The common law of England prevents the adoption of such a rule.

The three constitutions of the State of New Jersey have incorporated the common law of England, as of 1776, into the law of New Jersey.

New Jersey Constitution, 1776, Sec. XXII.
New Jersey Constitution, 1844, Art. 10, Par. 1.
New Jersey Constitution, 1947, Art. XI, Sec. 1, Par. 3.

Each of the foregoing constitutions provide that the common law of England shall remain in force until altered by statute.

The former Court of Errors and Appeals affirmed that constitutional doctrine in 1933.

Loudon v. *Loudon,* 114 N. J. E. 242, 252 (1933).

Our present Supreme Court (now the highest court in the State of New Jersey) reaffirmed the doctrine established by the *Loudon* case, *supra,* in 1949.

In re Vince, 2 N. J. 443 (1949).

In New Jersey, the rule exempting charitable organizations from liability for their tortious acts to the recipients of its bounty was established in 1925 by the courts without legislative sanction.

D'Amato v. *Orange Memorial Hospital, supra.*

This rule was repugnant to the common law of England in 1776. The English common law recognized the right of the individual to his personal security and delighted to give a remedy for the invasion of such right, whether done intentionally or negligently.

The Spirit of the Common Law-Pound.

Immunity from tort liability was very unnatural to the common law. Its origin with relation to charitable organizations can be found in the language of Lord Cottenham in an English case decided in 1846.

> *Feofees of Heriots Hospital* v. *Ross,* 12 Clark & Fin. 507, 513, 8 Eng. Repr. 1508 (1846).

For 20 years the *Feofees* case, *supra,* was followed by the English courts and then was expressly overruled and repudiated.

> *Mersey Docks Trustees* v. *Gibbs,* 11 H. L. Cas. 686 (1866).

The *Mersey* case, *supra,* indicates that such an exemption cannot be granted on common law principles and that charitable organizations are liable for their torts on common law principles just like any other tort-feasor.

As a result of the decision in the *Feofees* case, *supra,* the doctrine got a foothold in the United States where the decision was followed apparently in ignorance of the fact that the case had been overruled.

> *McDonald* v. *Mass. General Hospital,* 120 Mass. 432 (1876).

Our former Court of Errors and Appeals made the same mistake some fifty-five years later in the *D'Amato* case, *supra.*

Based upon the decision in the *D'Amato* case, *supra,* our courts since 1925 have adopted and applied the same unconstitutional rule.

> *D'Amato* v. *Orange Memorial Hospital, supra.*
> *Boeckel* v. *Orange Memorial Hospital,* 108 N. J. L. 453 (1932).
> *Bianchi* v. *South Park Presbyterian Church, supra.*

Rose v. *Raleigh, etc. Foundation,* 136 N. J. L. 553 (1948).

Woods v. *Overlook Hospital,* 6 N. J. Super. 47 (1949).

It is to be noted that charitable organizations are liable to the victims of their torts in all cases except those where the victim is the recipient of the bounty of the charitable organization.

Simmons v. *Wiley M. E. Church,* 112 N. J. L. 129 (1934).

Kolb v. *Monmouth Memorial Hospital,* 116 N. J. L. 118 (1936).

Starting with the *D'Amato* case, *supra,* down through the *Woods* case, *supra,* no case holds that a charitable organization does not owe a duty of reasonable care to other persons. These cases merely absolve the negligent charitable organization from liability. Therefore, this immunity does not mean that conduct which would ordinarily amount to an actionable tort on the part of others is still not equally tortious in character, but merely that protection of the Defendant, or the interests it represents, is given absolution from liability.

The common law maxim that where there is a right there is a remedy, necessarily implies that a right without a remedy is not a right at all but a mere abstraction.

Phelps Dodge etc. Corp. v. *United Elec., etc.,* 138 N. J. E. 3 (1946).

Willcox v. *Penn-Mut. Life Ins. Co.,* 357 Pa. 581 (1947).

It is, therefore, submitted that the granting of such an exemption denies to Petitioners a common law remedy,

which is a valuable property right, thereby denying to Petitioners the benefit of the provisions of the 14th amendment to the Constitution of the United States.

2. The courts in adopting and applying said rule of exemption have usurped the legislative function of government, thereby depriving Petitioners of the benefit of the due process clause of the 14th amendment to the Constitution of the United States.

The New Jersey Constitution of 1844 in Art. III, Par. 1, and the New Jersey Constitution of 1947, in Art. III, Par. 1, both provide for the separation of functions with reference to the various departments of government, specifically providing that no one branch of government shall exercise any of the powers belonging to any of the others.

The New Jersey Constitution of 1844 and the New Jersey Constitution of 1947 in their respective Article IV, Section 1, Paragraph 1, both provide "The legislative power shall be vested in a Senate and General Assembly".

The New Jersey Constitution of 1844 in Article VI, Section 1, Paragraph 1, provides: "The judicial power shall be vested in a Court of Errors and Appeals * * *", while the New Jersey Constitution of 1947, provides in Article VI, Section 1, Paragraph 1, "The judicial power shall be vested in a Supreme Court * * *".

Nowhere in either Constitution is the phrase "judicial power" defined.

The function of the judicial department of government is to interpret, construe and apply the law, not to enact or make it.

Sassaro v. *Wright Aero. Corp.*, 135 N. J. L. 366 (1947).

Independent Warehouses etc. v. *Scheele*, 134 N. J. L. 133 (1946), aff'd 331 U. S. 70.

The New Jersey Supreme Court has confirmed the theory of separation of functions by holding that neither branch of the government may exercise the power granted to the other.

Bendler v. *Bendler*, 3 N. J. 161 (1949).

It is elementary that a legal right may be regulated by the courts, but it is just as elementary that a legal right may not be taken away by the courts without proper legislative sanction.

Bigelow v. *Old Dominion, etc.*, 74 N. J. E. 457, 485 (1908).
Waibel v. *West Jersey & S. R. Co.*, 87 N. J. L. 573 (1915).
Murphy v. *Skelley*, 100 N. J. E. 193, aff'd 101 N. J. E. 793 (1926).
Stemmer v. *Kline*, 128 N. J. L. 455 (1942).
Haynes v. *Presbyterian Hospital Ass'n*, 45 N. W. 2d 151 (Iowa) (1950).
Werner v. *So. Cal. Ass. Newspapers*, 216 P. 2d 825 (Cal. Sup.) — U. S. —, 71 S. Ct. 81 (1950).
Dennis v. *Shaw*, 78 A. 2d 691 (Conn.) (1951).

A rejection of the common law requires legislative action.

Cohen v. *Bradley Beach*, 135 N. J. L. 276 (1947).

In adopting such a rule, the courts are exercising the police power of the State, which is solely within the jurisdiction of the legislature.

Tomlinson v. *Armour & Co.*, 74 N. J. L. 274, Reversed 75 N. J. L. 748 (1908).
Dimick v. *Met. Life Ins. Co.*, 69 N. J. L. 384, 389 (1902).
Chelsea etc. Co. v. *Marvin*, 131 N. J. E. 76 (1942).
State v. *Garden State Racing Ass'n*, 136 N. J. L. 173 (1946).

3. It is the duty of the courts to correct their errors.

Where the courts erroneously assume jurisdiction, it is the duty of the court to correct such erroneous assumption of jurisdiction.

Penn-Reading S. S. Lines v. *P. U. C.*, 5 N. J. 114 (1950).
Virtue v. *Freeholders*, 67 N. J. L. 139 (1901).

The duty to make such correction is in the judicial department. Nowhere is there any authority to be found in support of the proposition that the legislative department must correct the errors of the courts. It is impossible for the legislature to legislate a decision.

Pope v. *U. S.*, 53 F. Supp. 570, reversed 323 U. S. 1 (1944).

The United States Supreme Court did not hesitate to correct incorrectly established law. For almost one hundred years, the Federal courts exercised an independent judgment in matters of general law.

Swift v. *Tyson*, 41 U. S. 1 (1842).

But, in 1938, that court held that the prior doctrine introduced grave discrimination by non-citizens against citizens of the state and prevented uniformity, consequently, the doctrine was abolished.

Erie etc. Ry. Co. v. *Tompkins*, 304 U. S. 64 (1938).

Should the legislature at this late date enact a law restoring the aforesaid common law right of action, it would be of no help to Petitioners in that said law could not be retroactive in operation.

It is, therefore, submitted that the failure of the courts to correct the *D'Amato* decision, *supra,* deprived Petitioners of a property right in violation of the provisions of the Constitution of the United States, aforesaid.

4. Despite the denial of certification of Federal questions by the New Jersey Supreme Court, Petitioners did raise and argue Federal questions outlined herein, and, therefore, this court has jurisdiction.

The following statement appears at page 21 of the Brief for Petitioners: "The rule of immunity, as adopted, denies to plaintiffs the constitutional guaranty of equal protection of laws and due process. Where a court deprives a person of a common law remedy, he is denied due process and the equal protection of laws, as guaranteed by the United States Constitution (citing) U. S. Constitution, 14th amendment". Further, at the same page, "In the case at bar, the court in the *D'Amato* case, *supra,* deprived the plaintiffs of a remedy which the common law afforded them." At page 22 of said Brief it is stated: "By doing this, the court has classified, in that tort-feasors, called charitable organizations, are given special treatment by judicial decision, unlike that tendered to anyone else * * *. Furthermore, the constitutional guaranties are denied because the courts are, in reality, enacting legislation by way of judicial decision". On page 24 of said brief appears this statement: "The rule of immunity, as applied, impairs the obligation of contract, and, therefore, is unconstitutional (citing). United States Constitution, Art. I, Sec. 10, Cl. 1."

On page 9 of said Brief appears the following: "The rule of immunity of charitable organizations from liability for their tortious acts, as adopted by our courts, is unconstitutional. The courts of our state had and have no power or jurisdiction to exempt, or grant immunity to, charitable organizations from liability for their tortious acts".

It is, therefore, submitted that where the State court evades the Federal questions which independently may change the decision, this Court should take jurisdiction.

Fox River Paper Co. v. *Railway Com.*, 274 U. S. 651.
Abie State Bank v. *Weaver*, 282 U. S. 798.

This is so, so long as the Federal questions were raised in the State court before final decision.

Union Mut. Life Ins. Co. v. *Kirchoff*, 169 U. S. 103.

It might be noted that Chief Justice Vanderbilt and Justice Ackerson dissented from the majority in the case *sub judice* when it was before the New Jersey Supreme Court.

5. Where a so-called charitable organization operates Bingo games for profit, it is not entitled to the application of such a rule as applied in the *D'Amato* case.

In this case, Petitioners, when before the trial court, filed an affidavit showing that the Defendant operated a series of Bingo games for profit. Where a so-called charitable organization engages in such an operation it is not entitled to the benefit of such a rule, assuming that such rule is constitutionally applied. For immunity purposes an organization cannot possess a dual or split personality. Fund raising must be as charitable as fund dispensing. The worthiness of the cause does not carry with it a quality of magic.

People v. *Kiefer*, 16 N. Y. S. 2d 858, 173 Misc. 300 (1940).

For tax purposes, where property is employed for exempt and non-exempt purposes, the entire property is taxable.

New Brunswick v. *Columbia Building Corp.*, 18 N. J. Misc. 414 (1940).
New Brunswick v. *Eagles*, 18 N. J. Misc. 359 (1940).

It is, therefore, submitted that by applying such a rule of immunity to an organization which was not entitled to it, the Plaintiffs were deprived of a property right without the benefit of due process of law as guaranteed by the 14th amendment to the Constitution of the United States. Further by applying such rule of immunity to such an organization the court arbitrarily classified, thereby denying Petitioners the equal protection of law as guaranteed by the 14th amendment to the Constitution of the United States.

6. Since tuition was paid for the education of the infant plaintiff, the court had no power to exempt the school from liability for its negligent performance of the agreement.

The amended complaint, in part, reads as follows: "2. At the time and place aforesaid, Plaintiff, John Jones, an infant, was duly registered, accepted and admitted as a student in said school by said Defendant, for which the parents of said infant paid tuition". The father, Joseph Jones, at oral depositions testified " * * * Then we would pay the tuition each month. We would give Jackie the money to take over to the school * * *. I think Father Moore at one time forwarded money to the school. He paid half and we paid half * * *. We were in distress at that time * * *. He said that he will pay half and that we will have to pay the other half for the boy's tuition". Father Moore was not connected with the Defendant institution. Nowhere in the record is there any evidence that the Defendant exempted itself for its negligent performance of the agreement between these people and the Defendant. Therefore, when the courts attempt to impose

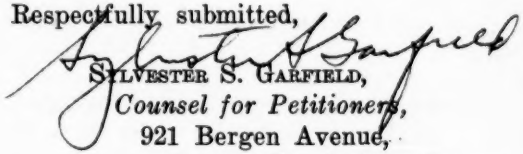
an exemption without statutory authority, they impair the obligation of contract within the meaning of Article I, Section 10, Paragraph 1, of the Constitution of the United States.

Conclusion

For the reasons set forth, it is submitted that this Petition for Writ of Certiorari should be granted.

Dated: September 26, 1951.

Respectfully submitted,



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Office-Supreme Court, U. S.
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Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

JOHN JONES, an infant, by his Guardian *Ad Litem*, Joseph Jones; JOSEPH JONES and BEATRICE JONES, Father and Mother, Jointly; and JOSEPH JONES, individually,

Petitioners,

vs.

ST. MARY'S ROMAN CATHOLIC CHURCH, operating under the style and name of St. Mary's Roman Catholic School (Grammar),

Defendant-Respondent.

No. 356.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Jurisdiction.

Respondent asserts that there is no jurisdiction in this Court to allow the Writ sought, because there is no genuine question arising under the Constitution of the United States, and the purported Federal questions were not raised in the Court of first instance below.

Question Presented.

Does the recognition and declaration by the New Jersey Supreme Court of a common law rule in a tort case, and the determination of the public policy of that State in such a case, raise a Federal question or one involving the Constitution of the United States?

Statement of Facts.

The infant plaintiff brought suit in the State Court against the defendant Church alleging that he suffered personal injury by reason of the negligence of a nun, who was an instructor in defendant's parochial school, and sought to charge the defendant vicariously with liability therefor. The alleged tort feasor was also made a defendant in said State Court suit but that defendant is not concerned with the present proceedings. The Supreme Court (highest court) of New Jersey determined that under the common law and public policy of that state there was no liability and affirmed a summary judgment for the defendant entered in the Trial Court pursuant to motion under the rules applicable in that Court.

REASONS FOR DENYING WRIT

I.

Petitioner has Failed to Follow the Rules of this Court.

Although the Petitioner states in his brief, page 2, that the Federal questions asserted were argued orally both in the Trial Court and upon the Appeal before the Supreme Court of New Jersey, the record does not support such statement. We search in vain for anything in the record

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specifying the stage in the proceedings in the Court of first instance at which and the manner in which the Federal questions sought to be reviewed were raised.

This deficiency and failure of the record would seem to be a plain violation of the second paragraph of Paragraph 1 of Rule 12 of this Court, as amended.

Neither do we find in the record, nor in the Petitioner's Brief, any statement of the grounds upon which it is contended that the questions involved are substantial within the holdings of *McArthur* v. *U. S.*, 315 U. S. 787 (1941) and *Zucht* v. *King*, 260 U. S. 174 (1922) and the cases therein cited. Respondent contends that there is no substantial question and that the arguments of the petitioner are specious in violation of Paragraph 1 of Rule 12 of this Court, as amended.

These failures in turn amount to a disregard of Paragraph 2 of Rule 38 of this Court and for failure to comply with these rules the Petition should be denied.

II.

No Federal or Constitutional Question is Presented.

The cause of action alleged and asserted by the plaintiff in the State Court was based upon an allegation of negligence and the alleged violation of a common law duty. Plaintiff did not rely in the State Court upon any statutory or constitutional provision. It was the duty thereupon of the State Court to decide the matter in accordance with the common law and public policy of New Jersey. This the Supreme Court of New Jersey did, and petitioner does not seriously claim otherwise. His complaint in essence is that the Court of Errors and Appeals (formerly the Court of last resort in New Jersey) erroneously determined the common law and public policy of the State of New Jersey

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in the case of *D'Amato* v. *Orange Memorial Hospital,* 101 N. J. L. 61 (1924). It is the Petitioner's present argument that the then highest Court of New Jersey erred in 1924 and that the Supreme Court of New Jersey (present highest Court) erred in following the unbroken line of New Jersey decisions which followed the *D'Amato* case.

The applicable New Jersey decisions are:

D'Amato v. *Orange Memorial Hospital,* 101 N. J. L. 61 (Court of E. & A., 1924);

Boeckel v. *Orange Memorial Hospital,* 108 N. J. L. 453 (Supreme Court, 1932);

Fair v. *Atlantic City Hospital,* 25 N. J. M. 65 (Atlantic County Circuit Court, 1946);

Bianchi v. *South Park Presbyterian Church,* 123 N. J. L. 325 (Court of E. & A., 1939);

Woods v. *Overlook Hospital Ass'n.,* 6 N. J. Super 47 (N. J. Super., 1949).

The *D'Amato* case brought to the Court of Errors and Appeals, the then highest Court in New Jersey, for the first time the question of the nature and extent of the liability or non-liability of a charitable institution for the negligent acts of its servant or servants. That Court thereupon had the duty to recognize, determine and declare what the common law and public policy of New Jersey was in such a situation. This it did, and it was its duty to do so.

> "The public policy of a state or nation is determined by its constitution, laws and judicial decisions, not by the varying opinions of laymen, lawyers or judges as to the demands of the interest of the public."
>
> *Hartford Fire Insurance Co.* v. *Chicago, Milwaukee, & C., Railway Co.,* 175 U. S. 91; 44 L. Ed. 84; 20 Supreme Court 83 (1899).

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The duty of the highest Court of New Jersey to recognize and declare the common law and the public policy of the State was recognized as early as 1908. In *Bigelow* v. *Old Dominion Copper Co.*, 74 N. J. Eq. 457 (Chancery, 1908) at page 508, Chancellor Pitney said:

> "The truth is that the public policy of New Jersey is not occult or mysterious nor are its sources far to seek. Subject to the Federal Constitution and a written Constitution of our own, the public of this State have adopted in the main the common law and equity system of England and this obtains herein subject to modification by the Legislature."

Despite the acknowledged duty of the highest Court of New Jersey to recognize and declare the common law and public policy of the State, the declaration and holding of the *D'Amato* case was not slavishly followed but was periodically re-examined. In *Bianchi* v. *South Park Presbyterian Church, supra,* an exhaustive re-examination of the common law and public policy involved was made, and the underlying rule affirmed in a careful and thorough opinion.

A rule of law and public policy laid down by the highest Court of a state, after mature deliberation and further confirmed after extensive re-examination, should not be lightly disturbed. This thought was expressed by Chancellor Kent, *1 Kent Commentaries 475,* wherein it is said:

> "When a decision upon a point of law has been made upon solemn argument and upon mature deliberation, the community have a right to regard it as a just declaration or exposition of the law and to regulate their actions by it. When a rule has once been deliberately adopted and declared, it ought never to be disturbed by the same Court, except for very urgent reasons and upon a clear manifestation of error."

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The Petitioner argues that the highest Court of New Jersey in 1924, and the highest Court of New Jersey as now constituted, had no right to determine, recognize and declare what the public policy of New Jersey and the common law applicable was and is.

The difficulty with Petitioner's position is that Petitioner has and had no right to have the Courts of New Jersey make any particular recognition and declaration of the common law and public policy of that State. Neither the Constitution of New Jersey nor the Constitution of the United States affords any such right.

It has been repeatedly held that the Constitution of the United States does not guarantee that the decision of State Courts shall be free from error or require that pronouncements shall be consistent.

Worcester County Trust Company v. *Reilly,* 302 U. S. 292, 82 L. Ed. 268 (U. S. Supreme Court, 1937);

Milwaukee Electrical Railway and Light Company v. *Wisconsin,* 252 U. S. 100, 64 L. Ed. 476 at page 480 (U. S. Supreme Court March, 1920);

Bonner v. *Gorman,* 213 U. S. 86, 53 L. Ed. 709 at page 711 (U. S. Supreme Court April, 1909);

Tracy v. *Ginsberg,* 205 U. S. 170, 51 L. Ed. 755 at page 760 (U. S. Supreme Court March, 1907);

American Railway Express Company v. *Kentucky,* 273 U. S. 269, 71 L. Ed. 639 at page 642 (U. S. Supreme Court February, 1927);

Bell Telephone Company v. *Penna. Public Utility Commission,* 309 U. S. 30, 84 L. Ed. 563 at pages 564 and 565 (U. S. Supreme Court January, 1940);

Emmons v. *Smitt,* 149 Fed. (2d) 869 at page 871 (C. C. A. 6, 1945);
Ladner v. *Siegel,* 148 Atl. 699 at page 703 (Supreme Court Penna. January, 1930).

The Supreme Court of New Jersey recognized this to be the law and consequently properly refused to certify the existence of a Federal question, although requested to do so (record, p. 55).

Conclusion.

For the reasons that

1. The Petitioner has failed to comply with the rules of this Court;
2. The Petitioner has failed to show the existence of a substantial Federal question

the application for a writ of Certiorari should be denied.

Respectfully submitted,

SMITH, JAMES AND MATHIAS,

By: ALLEN CONLEY MATHIAS,
Attorneys for Defendant-Respondent.

ALLEN CONLEY MATHIAS,
Of Counsel with Defendant-Respondent.